

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

MARK HALE, TODD SHADLE, and )  
LAURIE LOGER, on behalf of )  
themselves and all others similarly )  
situated, )

Plaintiffs, )

v. )

STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE COMPANY, EDWARD )  
MURNANE, and WILLIAM G. )  
SHEPHERD, )

Defendants.

Case No. 12-cv-00660 DRH-SCW

Judge David R. Herndon

Magistrate Stephen C. Williams

**FINAL PRETRIAL ORDER**

This matter comes before the court for Final Pretrial Conference held pursuant to Federal Rule of Civil Procedure 16.

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## II. NATURE OF THE CASE

The Racketeer Influenced and Corrupt Organizations Act, also known as RICO, is a United States federal law that provides a civil cause of action to any person who suffers injury to their business or property caused by a defendant's conducting the affairs of an enterprise through a pattern of racketeering activity.

In this class action, Plaintiffs claim that the Defendants violated RICO in an attempt to overturn in the Illinois Supreme Court a \$1.056 billion judgment in favor of approximately 4.7 million State Farm policyholders entered in *Avery v. State Farm Mutual Automobile Insurance Company*. *Avery* was a class action that was litigated in the Illinois state court system relating to State Farm's specifying the use of non-OEM replacement parts, which was tried before a Williamson County jury in 1999 and resulted in a judgment against State Farm of \$1.18 billion. In 2001, the Illinois Appellate Court affirmed the trial court judgment, but reduced the damages to \$1.056 billion. State Farm then appealed that decision to the Illinois Supreme Court. The appeal was briefed, argued, and submitted to the Illinois Supreme Court by May 2003. On August 18, 2005, the Illinois Supreme Court issued a decision overturning the \$1.056 billion *Avery* judgment.

In the time between the Illinois Appellate Court's decision that would have allowed a \$1.056 billion judgment in favor of the *Avery* plaintiffs and the

Illinois Supreme Court's decision to overturn that judgment, Circuit Court Judge Lloyd Karmeier and Appellate Justice Gordon Maag waged a judicial campaign for an open seat on the Illinois Supreme Court. In November 2004, then-Judge Karmeier was elected to the Supreme Court.

The Plaintiffs in this case were also Plaintiffs in the *Avery* case. In this case, Plaintiffs allege that State Farm, together with the other Defendants and several alleged co-conspirators who are not named as Defendants in this case, provided financial and other support to Justice Karmeier's candidacy, so that he could participate in deciding the *Avery* appeal in the Illinois Supreme Court. Justice Karmeier was one of the Illinois Supreme Court justices who voted to overturn the *Avery* judgment.

Plaintiffs claim that the Defendants deliberately misrepresented State Farm's support for Justice Karmeier in a 2005 brief filed in the Illinois Supreme Court while the *Avery* appeal was pending, and again misrepresented its role in a 2011 brief in response to a later-filed motion by Plaintiffs. Plaintiffs allege that the mailings of these two State Farm briefs are the two predicated acts of mail fraud constituting a pattern of racketeering activity in violation of RICO. Defendants deny these claims and allegations. Defendants contend that State Farm's two briefs were accurate and proper responses to Plaintiffs' motions to disqualify Justice Karmeier from participating in the Illinois Supreme Court's *Avery* decision and to ask the

Illinois Supreme Court to reinstate the \$1.056 billion judgment. According to Defendants, neither the State Farm briefs at issue nor Justice Karmeier's participation in *Avery* caused injury to Plaintiffs. Defendants also contend that Plaintiffs cannot prove the necessary elements of their RICO claims, that Plaintiffs' claims are barred because they were not timely filed, and that, under the *Noerr-Pennington* doctrine, State Farm's two briefs are protected by the First Amendment.

### III. **JURISDICTION**

- A. This is an action for damages.
- B. The jurisdiction of the court is disputed.

The subject matter jurisdiction of this Court, as asserted by the Plaintiffs, is conferred and invoked pursuant to 28 U.S.C. § 1331, and the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961 *et seq.* (specifically 18 U.S.C. § 1964 (c)). Further, this Court also has jurisdiction over this action as a class action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), providing for jurisdiction where, as here, "any member of a class of plaintiffs is a citizen of a State different from any defendant" and the aggregated amount in controversy exceeds five million dollars (\$5,000,000), exclusive of interests and costs. See 28 U.S.C. §§ 1332(d)(2) and (6).

Defendants assert that the Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine.

### IV. **UNCONTROVERTED FACTS**

The following facts are not disputed or have been agreed to or stipulated to by the parties:

1. *Avery v. State Farm Mutual Automobile Insurance Company* was a nationwide class action filed in Illinois state court in 1997, based on allegations that State Farm specified non-original equipment manufacturer replacement parts for repair of class members' vehicles in breach of their contracts and in violation of the Illinois Consumer Fraud Act ("ICFA"). The named Plaintiffs in this case were class members in the *Avery* case.

2. In 1999, after a jury trial, the trial court in *Avery* entered judgment against State Farm for \$1.18 billion.

3. In 2001, the Illinois Appellate Court affirmed the trial court judgment, but reduced the damages to \$1.056 billion. Justice Gordon Maag authored the appellate court decision.

4. State Farm filed a petition for permission to appeal with the Illinois Supreme Court in May 2001. The Illinois Supreme Court granted State Farm leave to appeal in October 2002, and heard oral argument on the appeal in May 2003. There are seven Justices on the Illinois Supreme Court. Justice Thomas recused himself from the appeal.

5. A seat became open on the Illinois Supreme Court when Justice Rarick announced in September 2003 that he would retire and not run for election at the end of his term in December 2004.

6. Circuit Court Judge Lloyd Karmeier and Justice Gordon Maag ran for the open seat on the Illinois Supreme Court. Judge Karmeier was

elected on November 4, 2004, and he was sworn in to the Court on December 6, 2004.

7. On January 26, 2005, the *Avery* plaintiffs filed a Conditional Motion for Non-Participation with the Illinois Supreme Court asking that Justice Karmeier not participate in the *Avery* decision. On January 31, 2005, State Farm filed an Opposition to the Conditional Motion for Non-Participation. On March 16, 2005, the Illinois Supreme Court denied the *Avery* Plaintiffs' Conditional Motion for Non-Participation without explanation.

8. On March 22, 2005, the *Avery* plaintiffs filed a Motion to Reconsider. State Farm filed an Objection to Plaintiffs' Motion to Reconsider on March 31, 2005. On May 20, 2005, the Illinois Supreme Court vacated its order denying the *Avery* plaintiffs' Conditional Motion for Non-Participation of Justice Karmeier, and entered an order stating that under the Illinois Rules, recusal was "a decision exclusively within the determination of the individual judge," and since Justice Karmeier had "advised the court that he will not disqualify himself," the "motion for conditional non-participation" and "the motion to reconsider" were "denied as moot."

9. On August 18, 2005, the Illinois Supreme Court, with Justice Karmeier participating in the decision, reversed the \$1.05 billion judgment.



10. On September 8, 2005, the *Avery* plaintiffs filed a Petition for Rehearing in the Illinois Supreme Court, which was denied.

11. On December 27, 2005, the *Avery* plaintiffs filed a Petition for a Writ of Certiorari to appeal the *Avery* decision to the United States Supreme Court. On February 3, 2006, State Farm filed a Brief in Opposition to the Petition. The United States Supreme Court denied the Petition on March 6, 2006.

12. On September 8, 2011, the *Avery* plaintiffs filed in the Illinois Supreme Court a Petition to Recall Mandate and Vacate August 18, 2005 Judgment. On September 19, 2011, State Farm filed a Response in Opposition to the Petition. On November 17, 2011, the Illinois Supreme Court denied Plaintiffs' Petition without explanation.

13. On May 29, 2012, the Plaintiffs filed their complaint in this federal court.

14. Justice Karmeier currently serves as the Chief Justice of the Illinois Supreme Court.

## V. **ISSUES**

### A. Issues of Law (and Law/Fact) to be decided by the Court

1. Defendants contend that this Court needs to decide the following legal issues: *Rooker-Feldman*, res judicata and collateral estoppel, and the meaning of injury to property under

RICO. Plaintiffs believe that such issues have already been decided by the Court and that no further consideration of these issues is warranted [docket 726]<sup>1</sup>.

2. Plaintiffs contend that the the amount of post-judgment interest accruing to the *Avery* judgment under Illinois law is a component of damages for the jury. Defendants contend that the Court needs to decide the availability of post-judgment interest under Illinois law.

3. Plaintiffs contend that this Court needs to determine as a matter of law the applicability of *Noerr Pennington*.

4. The parties agree that the Court should decide the following issues post-trial: prejudgment interest under federal law, trebling of damages under RICO, post-judgment interest under federal law, implementation and allocation of any damages to the plaintiff class and attorneys' fees to be awarded to Plaintiffs' counsel.

#### B. Issues for the Jury to determine<sup>2</sup>

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<sup>1</sup> The parties have filed motions *in limine* which contain questions of law to be decided by the Court and which are incorporated herein.

<sup>2</sup> Defendants expressly preserve all arguments that the issues listed for the jury should be resolved as a matter of law.

1. Whether each of the Defendants violated RICO, 18 U.S.C. 1964(c), and whether each of the Defendants conspired to violate RICO, 18 U.S.C. 1964 (d).
2. If so, whether the Defendants' RICO violations caused Plaintiffs to sustain an injury to property.
3. If the Court determines that the *Noerr-Pennington* doctrine and sham exception apply, then whether the elements of the sham exception have been proven.
4. Whether the statute of limitations bars Plaintiffs' claim, and whether any statute of limitation is tolled based on fraudulent concealment or equitable tolling.
5. The damages, if any, to be awarded to Plaintiffs.

**VI. WITNESSES**

- A. List of witnesses the Plaintiffs expect to call, including experts.<sup>3</sup>
  1. Expert witnesses.  
Thomas Myers  
Joanna Shepherd  
Mark Harrison  
Bruce Green  
Kent Redfield  
Richard Means  
Eric Adelstein<sup>4</sup>

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<sup>3</sup> Plaintiffs reserve the right to call any witness listed on Defendants' witness list.

Martha McKenna

2. Non-expert witnesses.<sup>5</sup>

Todd Shadle  
Laurie Loger  
Mark Hale  
Chief Justice Lloyd Karmeier  
Edward Murnane  
William Shepherd  
Edward Rust, Jr.\*  
Robert Schultz\*  
Gary Malawy\*  
David Luechtefeld\*  
Tiger Joyce\*  
Lisa Rickard\*  
Steve Tomaszewski\*  
Alan Adomite\*  
Douglas Whitley\*  
Tom Donohue\*  
Dwight Kay\*  
Cliff Pintak\*  
David Hill\*  
Carter Hendren\*  
Regina Dillard\*  
Kim Brunner\*  
Alan Maness\*  
Jeff Mays\*  
Herman Brandau\*  
Suzanne Nelson\*  
Rob Engstrom\*  
Douglas Wojcieszak

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<sup>4</sup> Plaintiffs include Mr. Adelstein and Ms. McKenna on this list so as to not waive their rights to call such witnesses. Plaintiffs are cognizant of the Court's July 19, 2018 order granting motions with respect to these witnesses.

<sup>5</sup> The parties have identified with an asterisk the witnesses whose testimony they may offer by means of playing designated parts of their videotaped deposition or by means of a summary of their deposition. Defendants' position is that if a non-party witness is available to testify at trial, their deposition testimony is inadmissible except by agreement.

B. List of witnesses defendant expects to call, including experts.<sup>6</sup>

1. Expert witnesses.

Bruce Dubinsky  
Anthony Jacob  
Thomas Morgan  
Ron Michaelson  
Sheila O'Brien  
Richard Painter  
Michael Reagan  
Lauren Stiroh  
Kent Redfield\*

2. Non-expert witnesses.<sup>7</sup>

Al Adomite  
Dave Anderson  
Herman Brandau\*  
Dr. Gerald Bratberg  
Kim Brunner \*  
Kevin Callis  
Cristin Connerty\*  
Mark Covington\*  
Mark Denzler\*  
Regina Dillard\*  
Tom Donohue\*  
Peggy Echols  
Rob Engstrom\*  
Thomas Gottschalk  
Mark Hale\*  
Carter Hendren\*

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<sup>6</sup> Defendants reserve the right to call any witness listed on Plaintiffs' witness list.

<sup>7</sup> This list includes witnesses whose deposition testimony may be offered by both Plaintiffs and Defendants and some witnesses Defendants may call purely for foundational and authenticity reasons or to address specific contentions and documents if admitted at trial. Plaintiffs do not agree that all of the witnesses listed have been properly disclosed, and reserve their right to file appropriate motions with respect to the propriety of calling certain fact witnesses.

David Hill  
Jeffrey Jackson  
Sherman "Tiger" Joyce  
Chief Justice Lloyd Karmeier  
Dwight Kay\*  
David Luechtefeld\*  
Laurie Loger\*  
Gary Malawy\*  
Alan Maness  
Jeff Mays\*  
Steve McManus  
Edward Murnane  
Suzanne Nelson\*  
Cliff Pintak\*  
Ed Rust  
Todd Shadle\*  
Bill Shepherd  
Barney Shultz  
Steve Tomaszewski\*  
Agnes Warfield\*  
Doug Whitley\*  
Jason Wietfeldt  
Douglas Wojcieszak\*

- C. Rebuttal Witnesses. The Plaintiffs may call rebuttal witnesses and the Defendants may call sur-rebuttal witnesses as may be necessary, without prior notice thereof to the other party.

**VII. EXHIBITS**

The Parties will submit the exhibit list at the Final Pre-trial Conference.

**VIII. DAMAGES**

Plaintiffs will be seeking the amount of the original judgment entered in the *Avery* case of \$1,056,636,180 (after remitter by the Illinois appellate court) plus statutory post judgment simple interest at the rate of nine percent per annum beginning from the date of the underlying judgment at the trial court. Plaintiffs will be seeking for the Court to treble the damages awarded by the jury per RICO.

Defendants submit that Plaintiffs are not entitled to recover post-judgment interest under Illinois law as an element of damages or otherwise.

**IX. BIFURCATED TRIAL**

No.

**X. TRIAL BRIEFS (to be provided per the order of the Court)**

Each side will brief discrete issues as discussed in open court and will be the subject of a meet and confer of the parties. The Court will endeavor to have a hearing on said matters as well an initial jury conference prior to trial.

**XI. LIMITATIONS, RESERVATIONS AND OTHER MATTERS**

- A. **Trial Date.** Trial is set for the week of September 4, 2018.
- B. **Length of Trial.** The probable length of trial is 25 days. The case will be listed on the trial calendar to be tried when reached.
- Mark appropriate box:** X Jury  Non-Jury
- C. **Number of Jurors.** The Court has previously indicated that it will seat ten (10) jurors.
- D. **Voir Dire.** The parties will be submitting a juror questionnaire.

**IT IS ORDERED** that the Final Pretrial Order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice or for good cause shown. Such modification maybe made either on motion of counsel or *sua sponte* by the court. The final pretrial order, as proposed by the parties, discussed fully in open court. The Court does not require each counsel to sign.

*David Herndon*



Judge Herndon

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District Judge